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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 514

EDGAR W. STOKES,

Petitioner,

vs.

CONTINENTAL ASSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled cause on April 3, 1957.

CITATIONS TO OPINIONS BELOW

The United States District Court in and for the Southern District of Florida, Miami Division, rendered no opinion in this cause. Its Final Judgment appears in the

printed transcript of record, nine copies of which are submitted herewith, at pages 63-64. The opinion of the United States Court of Appeals, Fifth Circuit, printed in Appendix A hereto, infra, p. 1-9, is reported in 242 F. 2d 893.

JURISDICTION

The judgment of the United States Court of Appeals, Fifth Circuit, was entered on April 3, 1957 (R. 293; p. 10, infra.) A timely petition for rehearing was filed April 23, 1957 (R. 294), and rehearing was denied July 3, 1957 (R. 297). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED

Whether a United States Court of Appeals may review the question of the legal sufficiency of the evidence to support a jury verdict where that question is properly raised on appeal and has been passed upon by the District Court below on appellant's motion for new trial, but where no motion for a directed verdict was made in the District Court by appellant.

CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment to the Constitution of the United States provides as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-

examined in any Court of the United States, than according to the rules of the common law."

STATEMENT

This suit was originally brought in the Civil Court of Record of Dade County, Florida, by petitioner against the respondent to recover benefits claimed under a health and accident disability insurance contract (R. 4-11). The case was removed by respondent to the U. S. District Court whose jurisdiction was invoked because of diversity of citizenship, the petitioner being a citizen of Florida and the respondent a citizen of Illinois (R. 1-4). In the District Court, trial before a jury was held.

The evidence in favor of petitioner showed that petitioner is a 58-year-old physician (R.170); that he had purchased the policy sued upon in 1927 (R.11); that this policy provided for benefits should he become disabled by bodily injury or sickness "so as to suffer a total loss of all his business time" (R. 8-11); that since 1933 he has suffered from essential hematuria (R.171); that in 1946 he suffered a coronary heart condition (R. 171); that in 1951 he found it necessary to sell his sanitorium as the strain of operating it was too much (R. 171); that in 1952 he suffered head and other injuries in a serious automobile accident (R. 172-173; 122-124); and that again in 1954 petitioner suffered a myocardial infarction, or heart attack (R. 80-84).

Four physicians who had treated or examined petitioner testified that in their opinion petitioner was occupationally completely disabled. Dr. Keedy, who had examined petitioner approximately every six to eight

weeks over a period of three years (R. 220, 209), testified petitioner had, among other things, psycho-neurotic tendencies and some tendencies verging on being truly psychotic (R. 213), and that petitioner was occupationally "completely disabled" (R. 219). Dr. Dornberger, who had attended petitioner for about two years as family physician (R. 100), testified petitioner was totally disabled from a medical standpoint and unable to engage in gainful occupation (R. 98-99). Dr. Taylor, who had observed petitioner over a period of four years (R. 135), testified that petitioner is disabled and is disabled permanently to practice medicine (R. 134-135). And finally, Dr. LeDrew testified that he had examined petitioner only once at the request of the respondent insurance company and had reported that in his opinion Dr. Stokes was unable to work (R. 163-164). In addition, both petitioner and his wife also testified concerning his condition (R. 169-197; 197-207).

Respondent, in opposition, presented only the testimony of two doctors. One, Dr. Strain, after giving petitioner a neurological examination lasting a little longer than one hour (R. 240), stated that all of his examination neurologically was within normal limits (R. 240), but restricted his statement "solely to the field of his actual motor functions from a neurological standpoint". (R. 241). The other witness, Dr. Stewart, never saw or examined petitioner and merely testified that certain electrocardiograms of petitioner did not give definite information that cardiol damage had occurred (R. 255). He admitted it was impossible to say whether there actually was or was not cardiol damage from just the cardiograms he had seen (R. 255).

Petitioner did not move for a directed verdict, and the case was submitted to the jury who returned a verdict for respondent (R. 281). Petitioner filed a motion for new trial expressly challenging the legal sufficiency of the evidence to sustain the verdict in grounds 1, 2, 3, 8 and 9 (R. 64-65). The motion was denied (R. 66), and petitioner appealed expressly assigning as error the denial of his motion for new trial (R. 68).

The Court of Appeals expressly refused to consider the question raised, holding "the sufficiency of the evidence to sustain the jury's verdict is not before us." See 242 F. 2d 893, 894; infra, p. App. 3

REASONS FOR GRANTING THE WRIT

Federal law concerning appellate review of trial court rulings denying a motion for new trial is in a hopeless state of confusion. This confusion stems all the way from a concern on the part of some that the 7th Amendment forbids appellate review of such a ruling (See **Neese v. Southern Railway Company**, 350 U.S. 77) to the opinion of Judge Learned Hand, e.g., that only a "procedural difficulty" (which has since been removed) prevents such appellate review. **Miller v. Maryland Casualty Co.**, 2 Cir., 40 F. 2d 463. This Court, in an opinion by Justice Brandeis (with JJ. Stone and Cordozo dissenting), has indicated that appellate review of orders denying a motion for new trial depends upon whether the action of the trial court is based on error of "fact" or of "law". **Fairmount Glass Works v. Cub Fork Coal Co.**, 287 U.S. 474; see **Southern Pac Co. v. Guthrie**, 9 Cir., 186 F. 2d 926, 930:

"Since the decision in the Fairmount Glass

Works case, supra, it could not be said that there was any fixed rule that an appellate court might not review on appeal from the judgment, an order made upon motion for a new trial, where review is for an error of law."

Still other courts have adopted what Judge Hand calls the "impracticable rule" (40 F. 2d at p. 465) of granting appellate review only when an "abuse of discretion" is shown. **Davis v. Yellow Cab Co.**, 5 Cir., 220 F. 2d 790; **Daffinrud v. United States**, 7 Cir., 145 F. 2d 724. Judge Parker has expressed the rule that a trial court's order on motion for new trial "is not reviewable upon appeal, save in the most exceptional circumstances." **Aetna Casualty & Surety Co. v. Yeatts**, 4 Cir., 122 F. 2d 350, 352.

Recently, this Court has indicated, more liberally, that a "dogmatic" denial of a new trial motion may be reviewed, **Griffin v. United States**, 336 U.S. 704; or that a denial of a new trial motion "when the findings of fact are wholly unsupported by evidence" is reviewable. **United States v. Johnson**, 327 U.S. 106, 111. See also **Metropolitan R.R. Co. v. Moore**, 121 U.S. 558, 574, where this Court ruled that the Supreme Court of the District should entertain and consider "on that ground" an appeal from an order denying a motion for new trial on the ground that the verdict was against the weight of the evidence.

Petitioner respectfully submits that the foregoing cases clearly show a need for this Court to review and to settle the precise scope of appellate review of orders denying motions for new trial. Some of the Nation's most outstanding federal circuit judges (e.g. JJ. L. Hand, Parker, Hutchinson, Pope) have wrestled with the con-

fusion which can only be removed and clarified by this Court.

Petitioner further submits that in this case, by his motion for new trial, he properly preserved and obtained the ruling of the trial court on the legal question of the insufficiency of the evidence to support the verdict. Clearly that question is a legal one. **Galloway v. United States**, 319 U.S. 372. Yet he has had no true appellate review of that legal question because the Court below ruled he "is foreclosed" by failure of his counsel to move for a directed verdict. If granted such review, it will show (1) a complete absence of any evidence in the Record that petitioner is not disabled, and (2) that petitioner has been unjustly denied the benefits of his policy with respondent, upon which he has paid premiums since 1927.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

Neal P. Rutledge

NEAL P. RUTLEDGE
Counsel for Petitioner

I HEREBY CERTIFY that a true copy of the foregoing Petition For A Writ of Certiorari To The United States Court of Appeals For the Fifth Circuit was mailed this 27th day of September, A.D. 1957 to: CAREY & PAPY, Attorneys for Respondent, Seybold Building, Miami 32, Florida.

Neal P. Rutledge

NEAL P. RUTLEDGE

APPENDIX A

The opinion and judgment below are as follows:

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16238

EDGAR W. STOKES,

Appellant,

versus

CONTINENTAL ASSURANCE COMPANY

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(April 3, 1957.)

Before TUTTLE, JONES and BROWN, Circuit Judges.

TUTTLE, Circuit Judge: This is an appeal from a judgment based on a jury verdict in the trial court in favor of the defendant insurance company in a disability case. The record is silent as to any motion for directed verdict for appellant and as to any objection to the charge of the court as to alleged errors here raised for the first time.

The plaintiff alleged that he was a physician who had been living in Louisville, Kentucky, where he had operated a sanitarium for alcoholics, drug addicts, nervous patients and mental patients for 27 years; that he sold the sanitarium in 1950 and gave up his operation of it in 1951; in February 1952 he was enroute to Florida, in which state he had learned that "there would be a position available in mental hygiene," and near Clewiston he had an automobile accident which he alleged caused him injuries that kept him in the hospital for five or six days after he had continued to Fort Lauderdale. There were no fractures and no permanent injuries except, as stated in his brief, over the next few months he "displayed symptoms of headache, nervousness, was exhausted, had a ringing in his ears." He testified that these symptoms "have persisted more or less to the present time" and that when he is under strain he cannot sleep and he is forgetful.

The testimony on behalf of plaintiff supported these allegations and medical witnesses gave the opinion that he was occupationally disabled. These opinions were in large part based on subjective symptoms and on the patient's history as related by him. All physical tests, including those of the brain and nervous system, were normal. On cross-examination the witnesses qualified somewhat their views as to the extent of disability, although it is quite clear that there was sufficient evidence on behalf of the plaintiff for the jury to have found in his favor. Medical witnesses for the defendant testified as to the normality of all tests made as to brain and nervous system as well as the heart. The plaintiff himself testified at length as

to his nervousness and irritability. He was therefore under constant observation by the jury both while on the witness stand and at the counsel table during the trial. In light of the fact that nearly all of the symptoms which plaintiff relied on to show his disability were subjective, that is, those related by him, and in view of his own participation in the trial and the fact that there was no proof of any effort by plaintiff to test his ability to engage in any business activity either within his medical field from which he had retired or as a mental hygienist, (**Mutual Life Ins Co. of New York v. Ellison** (5 Cir.), 223 F. 2d 686) we could hardly say, even if the point had been properly raised, that a jury verdict for the plaintiff was demanded.

Here, however, the sufficiency of the evidence to sustain the jury's verdict is not before us. Upon the conclusion of the entire case the defendant, and the defendant alone, moved for a directed verdict. The plaintiff was content to let the case go to the jury. We have repeatedly held that in such circumstances the question of sufficiency of the evidence to support a verdict for the defendant is foreclosed.

> "We find that no motion by any appellant was made in the trial for an instructed verdict, so that no question of the sufficiency of the evidence has been properly raised; ... ."
> **Baten v. Kirby Lumber Corp.**, (5 Cir.), 103 F. 2d 272, 273.

In **Boudreaux v. Mississippi Shipping Company, Inc.**, (5 Cir.), 222 F. 2d 954, we said:

"(1) Appellee, insisting that the jury's verdict is amply supported on the record, points out that there was no motion for a directed verdict, nor any objection to the giving or the failure to give an instruction. So pointing it urges upon us that the assigned error presents nothing for our consideration under the plain provisions of Rule 50(b) and Rule 51 of the Federal Rules of Civil Procedure, 28 U.S.C.A., and the authorities construing and applying them. We agree that this is so.

"(2) This court has never departed from but has consistently reaffirmed the rule governing in cases of this kind, as laid down in Baten v. Kirby Lumber Corp., 5 Cir., 103 F. 2d 272, 274:

'Whether the verdict is authorized by the evidence is a question not reserved in the trial. The defendants went to the jury without challenging its sufficiency, and no error can be attributed to the judge thereabout. Federal appellate courts do not directly review jury verdicts but only rulings of the judge which may have affected the verdict. Rule of Civil Procedure 50, 28 U.S.C.A., following section 723c does not do away with but emphasizes the necessity of a motion for a directed verdict to raise the legal question whether the evidence is sufficient.'"

The reason for this rule makes clear that it is no mere technicality. If a party believes that his opponent has failed to produce the sufficiency of evidence that will

support a verdict in his favor, he can choose either to ask the court to direct a verdict in his favor or he can take his chances with the jury. It is something of a gamble with him. If the court directs a verdict in his favor and this action is later reversed, he must face a new trial. He may therefore, in a doubtful case, prefer to leave his case up to the jury, as he did here. Having done so, and having lost before the jury, he cannot be heard later to say that the trial judge should be put in error for having submitted the matter to the jury in the first place. As has been so succinctly stated by Judge Sibley, under the circumstances of this case, "no error can be attributed to the [trial] court thereabout." **Baten v. Kirby Lumber Company, supra,** at 274.

The same bar exists to our considering the remaining contentions of appellant. The policy here in question does not have the usual language of disability policies such as "wholly . . . unable to engage in any occupation or profession or to perform any work for compensation, gain or profit," the language before the Florida court in **New England Mutual Life Ins. Co. v. Huckins,** 173 So. 696, or "impossible for the insured to follow a gainful occupation," the language considered by us in the Florida case of **Mutual Life Ins. Co. v. Ellison** (5 Cir.), 223 F. 2d 686. The language in the present policy is "If the insured is disabled by bodily injury or by sickness so as to suffer a total loss of all of his business time . . . "

In his printed brief and reply brief appellant does not directly and categorically urge that this language merits a different construction from that given to the more usual

language first quoted above. He implies that the language does place upon the insurance company the burden of showing that the insured is able to perform duties of some other business or activity once it is shown that he is unable to perform the usual and customary acts in connection with the practice of medicine, his occupation at the time the policy was issued.

First, as to the construction of the language itself. It may be that if the Florida courts were asked to decide that the language here used required only a showing that plaintiff was disabled from carrying on the duties of a physician to permit him to recover it might so hold. The plaintiff here, however, avoided making such a contention in the trial court and in his written briefs here. Only in oral argument did counsel take this unequivocal position. It may be that the reason he did not request a charge to that effect by the trial court (which he did not) is that it was plain from plaintiff's own testimony that before the injuries or sickness complained of he had already abandoned, or retired from, the practice of medicine, and had gone to a state where he could not continue to do so.[1]

Be that as it may the appellant did not request a jury charge embodying his concept of the proper construction of "loss of all of his business time." Moreover his counsel actively participated in the framing of the charge of the court that was given and of which he now complains.

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[1] Appellant's brief states that he had learned that there would be a position available in "mental hygiene" in Fort Lauderdale; that "this appears to be a field of medicine which apparently does not require the participant to be examined under state laws."

This charge was:

> "The language of the policy dealing with disability does not in legal contemplation mean a state of helplessness or of inability or incapacity to do any part whatever of an occupation or profession, or to perform any work whatever for compensation, gain or profit, but the disability contemplated means disability or inability to the extent of being wholly or [sic] permanently unable to do substantially all of the material acts that are usually required to be performed in the occupation or profession or work in which the insured is engaged, or in which he might have engaged within the contemplation of the particular insuranca policy."[2]

The trial court held extended discussion with counsel during the trial in the absence of the jury in an effort to iron out all difficulties as to the charge on this point. The court announced that it would charge the jury as follows, defining "business time":

> ". . . . I charge you that 'business time' in a policy insuring against loss of business time caused by accident or injury or sickness refers to time loss from the occupation in which the insured was engaged at the time the disability was sustained, or the time lost from some other occupation in which the insured might have been able to have been engaged within the range of his

[2]The use of the word "or" between "wholly" and "permanently" is clearly inappropriate. We do not know whether it is a misprint or inadvertence, but neither party here complains of it.

> normal ability, taking into consideration his education, training and work, and his physical and mental condition. If the insured becomes physically or mentally incapacitated to such an extent as to be wholly unable to engage, so as to suffer total loss of business time. The language of the Policy involved in this case reads that payment shall be made if the insured suffers a total loss of business time."

No objection or exception was taken to this proposed charge by plaintiff's counsel and no complaint is made of it here. The court then went on to read the paragraph defining disability quoted above, to which one of appellant's counsel said "The word 'permanently' was in there, and I don't think it should be." No objection was made to the definition of disability.

Thereafter the court gave the charges just as he had read them to counsel and then asked "Have there been any instructions, counsel, that you have noted that we passed over?" Thereupon Mr. Sams, counsel for appellant, stated "I think that covers it Judge."

We cannot assume that trial counsel overlooked the possibility that appellant might have succeeded in obtaining a more restrictive charge from the court as to the meaning of "loss of all of his business time" than that it meant substantially the same as "wholly . . . unable to engage in any occupation, etc." We do, however, recognize that such a request if made might have rendered the plaintiff's verdict, if won, vulnerable to attack on appeal. Counsel was required, therefore, to

elect whether to put the case to the jury on the law as announced or to risk a reversal on appeal for an incorrect charge. Having made the election he is bound by it. Even though we assume that the Florida courts might construe the language in this policy as requiring only a showing that plaintiff was disabled from practicing medicine. the plaintiff, for reasons best known to himself, preferred not to insist on this definition. That is why this court adheres to the rule of the Boudreaux case, **supra**, and doubtless why the Supreme Court said in **Palmer v. Hoffman**, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645; "In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error."

Counsel for appellant, in oral argument, urged that we here have an exception to the general rule, and that we should note obvious error to prevent manifest injustice. A simple answer to this contention is that our reading of the record convinces us that if the court misconstrued the Florida law it is not an obvious error for counsel never pointed it out in the extended discussion over the charge and counsel does not cite any Florida cases to support his position here. In fact he relies on the language of the Florida Supreme Court in **New England Mutual Life Ins. Co. v. Huckins, supra**, a case in which the normal type of disability clause was before the court. Moreover our reading of the record fails to convince us that an affirmance of the judgment of the trial court would result in manifest injustice.

The judgment is AFFIRMED.

JUDGMENT.

Extract from the Minutes of April 3, 1957.

EDGAR W. STOKES,

No. 16238, versus

CONTINENTAL ASSURANCE COMPANY.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Edgar W. Stokes, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.